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APPENDIX

Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
JANUARY 10, 1972
CERTIORARI GRANTED APRIL 3, 1972

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IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF VIRGINIA

DOCKET ENTRIES

1970

Jan. 7
Filed PETITION TO ENFORCE INTERNAL REVENUE SUMMONS with attachments. Issued summons and delivered same to Marshal for service returnable 10 days from date of service.

Jan. 8
Filed and entered order to show cause returnable 1-23-70. Delivered to Marshal for service.

Jan. 14
Filed Marshal's return on summons and Order to Show Cause executed on Shaffer on January 9, 1970.

Jan. 19
Filed ANSWER TO HAROLD L. SHAFFER with certificate of mailing noted thereon.

Jan. 19
Filed MOTION TO INTERVENE AS RESPONDENT and ANSWER OF INTERVENER RESPONDENT with certificate of mailing noted on each.

Feb. 27
Filed FINDINGS OF FACT AND CONCLUSIONS OF LAW. Certified copies to counsel of record.

Feb. 27
Filed and entered order dated February 25, 1970, wherein it is ADJUDGED, ORDERED and DECREED that respondent, Harold L. Shaffer, should be and he hereby is, dismissed from this proceeding. It is further ORDERED that the motion to intervene Lillian V. Couch be granted; and it is further ORDERED that John G. Rocovich, Jr., Esquire, appear before the petitioner, Edward F. Jennings, at the U. S. Attorney's Office, Roanoke, Va. for the purpose of producing for examination

and/or copy by photostating copy or other mechanical means of reproduction the books, etc. as set forth in said order. In the event the petitioner and Mr. Rocovich cannot mutually agree on a time and place, then they are to appear as set forth in said order. It is further ORDERED that the respondent, Harold L. Shaffer, shall appear before the petitioner Jennings at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968. Upon oral request of Mr. Rocovich, and with consent of counsel for the petitioners, a stay of execution of this order is granted for a period of thirty days from the date of entry of same to permit Mr. Rocovich the opportunity to file an appeal from this final order. Copies certified as directed and recorded in Civ. O. B. 27, page 76.

March 6
Filed NOTICE OF APPEAL and copy certified to James G. Welsh, Asst. U. S. Atty. this date.

March 13
Filed Transcript of proceedings held 2-2-70.

April 9
Filed Bond for Costs on Appeal in the penal sum of $250.00 with The Travelers Indemnity Company as surety thereon. Power of Attorney attached thereto.

April 10
Mailed Record On Appeal to the Clerk of the United States Court of Appeals for the Fourth Circuit, Richmond, Virginia. Copy of index, docket entries and transmittal letter forwarded to Leigh B. Hanes, Jr., Esq., U. S. Attorney; to John M. Dowd, General Litigation Section, Tax Division, Department of Justice, Washington, D. C. and to John G. Rocovich, Jr., Martin, Hopkins and Lemon, Sixth Floor Boxley Building, Roanoke, Virginia, counsel for Mrs. Couch.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 14,546

United States of America, and
Edward F. Jennings, Special
Agent, Internal Revenue Service,

Appellees

versus

Lillian V. Couch,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Ted Dalton, District Judge.

(Decided October 12, 1971.)

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

John G. Rocovich, Jr., (Claude D. Carter, and Martin, Hopkins, and Lemon on brief) for Appellant, and Joseph M. Howard, Attorney, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Lee A. Jackson and John M. Brant, Attorneys, Department of Justice, and Leigh B. Hanes, Jr., United States Attorney, and James G. Welsh, Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

From 1955 until the present controversy arose, the intervenor, Mrs. Couch, regularly delivered all of her financial books, records, and documents to her accountant, Mr. Shaffer, so that he might compute and fill out her income tax returns. These records were thereafter stored by the accountant in his office. In 1969 an Internal Revenue agent investigating Mrs. Couch's returns for the years 1964 through 1968 requested, and was permitted to review those records. During that investigation the agent became suspicious of fraudulent activity so he sought the aid of a special agent. It was customary procedure to have a special agent associated to investigate a suspected crime. Upon arrival, the special agent, Mr. Jennings, gave Mrs. Couch the *Miranda* warnings. She thereafter instructed her accountant not to permit further examination of the records.

Pursuant to authority vested in him by 26 U. S. C. A. §§ 7402 and 7604, Special Agent Jennings subpoenaed the accountant to present the records in his possession and to testify about his connected activities. Instead of complying, the accountant delivered the records to Mrs. Couch's attorney as she instructed. Thereupon, Special Agent Jennings instituted this action to enforce compliance with the subpoena. The lower court ordered the records produced, and appeal was taken from that order.

The intervenor-appellant sets out two alleged infirmities in the decision, but we find them to be without merit. She first asserts that the statutory authorization for the subpoena is strictly limited to civil suits so that its use was improper in the present case which is po-

tentially criminal. The subpoena power is not so narrowly restricted, however, for it is well-recognized that the subpoena is proper as long as the investigation retains a legitimate civil purpose. See *Donaldson v. United States,* 400 U. S. 517; *United States v. Giordano,* 8 Cir., 419 F. 2d 564; *United States v. Ahmanson,* 9 Cir., 415 F. 2d 785; *United States v. Hayes,* 7 Cir., 408 F. 2d 932. The District Court found after a hearing that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *."

The intervnor also attempted to encompass the records within her Fifth Amendment privilege against self-incrimination. The answer to this contention lies in the fact that the records were not in the intervenor's possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records. They had passed from the sphere of privilege surrounding her, for there was no accountant-client privilege. The present situation is readily distinguished from the case upon which the intervenor relies, *Stuart v. United States,* 5 Cir., 416 F. 2d 459. The testimony there disclosed that the suspect had delivered her records to the accountant for the sole purpose of providing a more convenient time and location for conducting the pending investigation.

Affirmed.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, Petitioners	)	
v.	)	
HAROLD L. SHAFFER, Respondent	)	CIVIL NO. 70-C-3-R
v.	)	
LILLIAN V. COUCH, Intervenor	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on to be heard on the petition and answers thereto, on the Order to Show Cause entered by the Court on January 7, 1970, the hearing thereon having been reset and held on February 2, 1970, and the Court having heard the testimony elicited, having examined the exhibits admitted into evidence, and having heard argument of counsel, and being fully advised in the premises, therefore enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action brought by the petitioners for the purpose of enforcing an Internal Revenue Service summons issued to the respondent, Harold L. Shaffer.

2. The petitioner, Edward F. Jennings, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director in Richmond, Virginia, with post of duty in Roanoke, Virginia.

3. The petitioner, Edward F. Jennings, in his capacity as a Special Agent is conducting a continuing and joint investigation with Revenue Agent Dennis L. Groves for the purpose of ascertaining the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

4. On August 18, 1969, as part of the investigation described in paragraph 3 above, an Internal Revenue Service Summons, a copy of the original of which was admitted into evidence as Respondent's Exhibit 1, was issued by the petitioner, Edward F. Jennings, directing the respondent, Harold L. Shaffer, to appear before the said Edward F. Jennings on September 2, 1969, at 9:30 a. m. to testify and to produce for examination certain books, records, and documents all of which are described in the summons.

5. On August 18, 1969, the summons described in paragraph 4 above, was served on the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, by handing a copy thereof to Harold L. Shaffer.

6. That the respondent, Harold L. Shaffer, has served as the tax consultant for the taxpayer, Lillian V. Couch, from 1955 to the present and has prepared her tax returns for each year from 1955 to the present.

7. The respondent, Harold L. Shaffer, while serving as tax consultant to the taxpayer, Lillian V. Couch, received from her and thereafter maintained continuous possession of the various books, records and documents described in the summons until September 2, 1969; these records, books and documents were utilized by Harold L Shaffer for the purpose of preparing the tax returns of Lillian V. Couch for the years 1955 to the present.

8. That on August 18, 1969, Harold L. Shaffer was in possession and custody of the books, records and documents which are described in the summons for the years 1964 through and including 1968.

9. That on September 2, 1969, the respondent, Harold L. Shaffer, refused to produce the books, records and documents and to testify as required by the summons on the ground that he had delivered the papers, etc. to Mrs. Couch's attorney.

10. That on September 2, 1969, the respondent, Harold L. Shaffer, turned over the books, records and documents requested by the summons to John G. Rocovich, Jr., the attorney for Lillian V. Couch.

11. John G. Rocovich, Jr., the attorney for the taxpayer, Lillian V. Couch, is presently and at all times since September 2, 1969, has been in possession of the books, records and documents requested by the summons.

12. On January 7, 1970, the petitioners filed this action for the purpose of judicially enforcing the Internal Revenue Service summons.

13. The respondent filed his answer to the petition on January 19, 1970.

14. On February 2, 1970, the Court granted the motion of Lillian V. Couch to intervene.

15. It is necessary for Special Agent Edward F Jennings to examine the books, records and documents sought by the summons described in paragraph 4 above and to take the testimony of the respondent, Harold L. Shaffer, in order to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U. S. C. Sections 7402 and 7604.

2. The taxpayer may intervene to assert her rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. The petitioner, Edward F. Jennings, as a duly commissioned Special Agent of the Internal Revenue Service is empowered to issue Internal Revenue Service summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U. S. C. 7602, and Treasury Regulation 301.7602-1 (26 C. F. R. 301.7602-1).

4. The Internal Revenue Service summons involved in this case was properly issued to and served upon the respondent in this case.

5. The Internal Revenue Service summons described in paragraph 3 above, was issued as part of an investigation which is being conducted pursuant to a legitimate purpose, namely to determine the correctness of income tax returns and the possibility of fraud filed by Lillian V. Couch for the years 1964 through and including 1968.

6. That Revenue Agent Dennis L. Groves and the petitioner, Edward F. Jennings, are conducting a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

7. A special agent of the Internal Revenue Service is empowered to issue an Internal Revenue Service summons pursuant to Section 7602 even though the evidence so obtained may ultimately be used in a criminal prosecution should one ever be instituted.

8. The records and testimony sought by the Internal Revenue Service summons are necessary, material and relevant to a determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

9. At the request of the taxpayer and after service of the summons upon him the respondent turned the records over to John G. Rocovich, Jr.

10. The respondent was in possession of the books, records and documents requested in the summons at the time of service of summons and should have requested the guidance of the Court before taking any action with

respect to turning over the records to Attorney Rocovich, (*United States* v. *Bryan,* 339 U. S. 323, 331 (1950); *Blair* v. *United States,* 250 U. S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932).

11. The rights of all parties with respect to the records involved in this proceeding are fixed and determined on the basis of the rights as they existed at the time the summons was served.

12. Since no search or seizure of any books, records or documents in the possession of the taxpayer are involved in this proceeding, the provisions of the Fourth Amendment of the United States Constitution are not applicable here.

13. Since, at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons.

14. Since the records in question were turned over to an officer of this Court, namely, John G. Rocovich, Jr., who now has possession thereof, this Court, acting under its general equity powers, may order Mr. Rocovich to produce those records on the same basis and on the same terms as it could were the records still in the possession of the respondent.

15. An order should be issued requiring the respondent to appear and give testimony with regard to the determination of the correctness of the income tax

returns of Lillian V. Couch for the years 1964 through and including 1968.

Enter:

Ted Dalton
February 25, 1970

A TRUE COPY, TESTE:
Virginia M. Ayers, Clerk

By: Carolyn Brammer
Deputy Clerk

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA :

and

EDWARD F. JENNINGS, :
Special Agent,

Petitioners :

v. : Civil Action No.70-C-3-R

HAROLD L. SHAFFER, :
Respondent

and :

LILLIAN V. COUCH,
Intervenor Respondent :

Proceedings held in the United States District Court for the Western District of Virginia, Roanoke Division, Roanoke, Virginia, beginning at 1:05 P. M. on February 2, 1970.

Before:

HONORABLE TED DALTON, CHIEF DISTRICT JUDGE

Appearances:

JAMES G. WELSH, ESQ.
Assistant United States Attorney
Western District of Virginia
Roanoke, Virginia
and

JOHN M. DOWD, ESQ.
and

PARK T. ZIMMERMAN, ESQ.
Attorneys
General Litigation Section
Tax Division, United States Department of Justice
Washington, D. C.
counsel for the Petitioners

EUGENE STREET, ESQ.
Shenandoah Building
Roanoke, Virginia
counsel for the Respondent, Shaffer

JOHN G. ROCOVICH, JR., ESQ.
Martin, Hopkins and Lemon
Sixth Floor, Boxley Building
Roanoke, Virginia
counsel for the Respondent, Couch

WITNESSES

Name	Direct	Cross	Red.	Rec.
Shaffer, Harold L.	2	6	11 33	11 34
Groves, Dennis L.	13	15	—	—
Jennings, Edward F.	21	27	—	—

page [1] Court convened at 1:05 P. M.

THE COURT: The Clerk will call the case.

THE CLERK: Number 70-C-3-R, United States of America and Edward F. Jennings, Special Agent, Internal Revenue Service, versus Harold L. Shaffer.

MR. WELSH: Your Honor please, this matter is a tax matter that is being handled by the Department of Justice. The gentlemen from the Tax Division are Mr. John Dowd and Mr. Tom Zimmerman, who will handle the Government's case.

THE COURT: We are glad to have Mr. Dowd and Mr. Zimmerman, and the Clerk will recite that they are appearing here for the Government.

Call your first witness.

MR. DOWD: Your Honor, in the interest of time, the United States will rely on the affidavit of the Special Agent, and I believe we are here on your order to show cause to the respondent. So, that's initially what the Government will do in this case. If Your Honor would like to hear from the Special Agent, we would be happy to put him on, but I don't think it's necessary.

THE COURT: What is the substance of the affidavit? I think I know in a general way.

MD. DOWD: The affidavit, the substance of it is

page [2] that they issued the summons to Mr. Shaffer, who had possession of the books, records and documents of the taxpayer, Lillian V. Couch, also known as Lillian V. Aleshire, I believe it is, and that these documents are necessary to determine the correctness of the tax returns of Mrs. Couch, and he did it on a certain date, and the respondent, Mr. Shaffer, refused to comply with the requirements of that summons.

THE COURT: All right, Mr. Street.

MR. STREET: Mr. Shaffer, would you take the stand, please?

MR. HAROLD L. SHAFFER, the respondent in this action, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STREET:

Q Would you state your name to the Court, please, sir?

A Harold L. Shaffer.

Q What is your residence address, Mr. Shaffer?

A 2233 Cantle Lane, Southwest.

Q And what is your occupation, Mr. Shaffer?

A Tax consultant.

Q Do you have any relationship with a Mrs. Couch?

A Only on a relationship of preparing her income tax returns in the past.

page [3] Q Did you ever, at any time, have possession of any books or papers belonging to Mrs. Couch?

A Yes, sir.

Q When did you have possession of such books?

A Up until, I don't know the exact dates, but up until the return of this subpoena that was given to me.

Q At the time that you had these books and papers in your possession, were they ever viewed by the Internal Revenue Service Agents?

A Yes, sir.

Q Who looked at the books from the Internal Revenue Service?

A Mr. Dennis Groves.

Q When did he view the books and records?

A I don't know the exact date now.

Q Did he view them once or more than once?

A He was there several days.

Q He was "there," where?

A At the office that I had at the time on Peters Creek Road.

Q Did you ever raise any objection to him viewing the books and records of Mrs. Couch?

A No, sir.

Q Did any other Internal Revenue Agent ever ask to view the books and papers of Mrs. Couch?

page [4] A Ask to view them?

Q Yes.

A No, sir.

Q Did you ever refuse permission to any Internal Revenue Agent to look at the papers and books in your office?

A No, sir.

Q I show you a copy of a summons here and ask you if you received this summons.

A Yes, sir.

Q Would you read it to the Court, please?

A In its entirety?

THE COURT: I have a copy, I think, here. "All books, records . . ."

MR. STREET: Yes, sir.

THE COURT: I have a copy.

MR. STREET: All right, sir.

THE COURT: It's in the record.

Q The date on this summons, I believe, for your appearance was September the 2nd. Is that correct?

A Yes, sir.

Q And on September the 2nd at 9:30 A. M., which is the time stated in the summons, did the Internal Revenue Agent, Mr. Jennings, appear at your office at 9:30 A. M.?

A No, sir.

Q What time did he appear?

page [5] A A little after 10:00 o'clock. Ten—Somewhere—Fifteen after 10:00, somewhere along there.

Q Did he ask you for the books and papers of Mrs Couch at that time?

A Yes, sir.

Q Did you give them to him?

A No, sir.

Q Why not?

A They were not in my possession at that time.

Q Where were they?

A With the attorney of Mrs. Couch.

Q Why did he have them?

A Because she instructed me to turn her records over to him.

Q Are you willing to testify to the Internal Revenue Agents of any knowledge that you have concerning Mrs. Couch's records?

A Yes, sir.

Q Did you ever refuse to turn over the records to the Internal Revenue Agents while they were in your possession?

A Yes, sir.

Q When was this?

A I think Mr. Jennings and Mr. Groves were—had requested the records to be turned over to them, but on advice of Mrs. Couch, she instructed me not to turn them over and

page [6] turn them over to her attorney.

Q Did you refuse to turn the records over to them before or after you received the subpoena?

A Before, sir.

Q At this time you refused to turn the records over to them, did you refuse to let them look at them?

A No, sir.

Q At this time then you were willing to let them look at them, but you wouldn't give them to them to take away from your office. Is that correct?

A That's correct.

MR. STREET: That's all the questions I have, Your Honor.

MR. DOWD: May I see the subpoena that is part of the record?

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Shaffer, do you have the duplicate copy that the Special Agent gave you of his subpoena?

A Not—Not in my possession today. I have it, sir.

Q I ask you to take a look at it, Mr. Shaffer. Would you tell me if there is another page that goes on this subpoena?

A Another page?

page [7] Yes. I show you a blank—a blank summons which is a duplicate and ask you if you recognize that that is more akin to the summons you received from Special Agent Jennings.

A You mean this print on the back?

Q Yes.

A Yes, sir.

Q It did have this print on the back?

A Right.

Q Mr. Shaffer, how long have you been a tax consultant for Mrs. Couch?

A How long?

Q Yes.
A Up until—I don't know the exact date, sir.

Q Has it been a year, five years, ten years?
A Oh, it has been since 19—approximately 1955, I suppose.

Q 1955?
A '55, '56.

Q I see. When you did her work, did she turn over books and records and documents to you?
A Yes, sir.

Q And from those books and records and documents, you took information and worked up her income tax return. Is that correct?
A That's right, sir.

page [8] Q Could you describe some of the documents and books and records you had in your possession?
A Bank statements, daily—daily reported sales, and the necessary information, payroll records and what have you.

Q I see. On the date that this summons was issued to you, did you have these books, records and documents in your possession?
A Yes, sir.

Q Mr. Shaffer, I want you to take another look at the face of this summons and down under the time for

the return date, would you read that statement into the record, please?

A "Failure to comply . . ."?

Q That's correct.

A "Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience."

Q Were you aware of that statement when you got the summons?

A Yes, sir.

Q Did you read that statement?

A Yes, sir.

page [9] Q Did you also read the language which is not on this summons that is part of the record here, but which I showed you from a blank, the statute, 7602, 7604 (a) and (b), 7605 and 7210?

A Yes, sir.

Q You are aware of these?

A Yes, sir.

Q The language in here. When did you decide to turn these records over to Mr. Rocovich, the attorney for the taxpayer?

A On the advice of Mrs. Couch. She called me and told me that she had engaged an attorney and asked me to turn all records over to him.

Q I see. So on September 2nd you did refuse to

turn over the books, records and documents to the Revenue and Special Agents. Is that correct?

A I did, because I didn't have them.

Q So you disposed of them before the return date. Is that correct?

A That's right.

Q At what time before the return date did you dispose of them?

A I don't know exactly.

Q Was it on September 1st or September 2nd?

A Yes, September the 2nd, I suppose.

page [10] Q September the 2nd?

A Yes, sir.

Q At what time?

A 8:30.

Q I see. Did you receive a phone call on that morning from Special Agent Jennings, telling you that he would be late for the appointment at your office?

A Yes, sir.

Q And did you agree for that delay in the return of the summons?

A Well, he just called and said he'd be late.

Q I see.

A And I said, "Well, we're here waiting for you."

Q I see. Where are these records now? Do you know?

A I assume with Mr. Rocovich.

MR. DOWD: If I could have just one second, Your Honor.

Q On September 2nd, in the morning at 8:30, where were these records, in fact? Where was the physical location of these records?

A In the office of—on Peters Creek Road.

Q Your office?

A No, sir. At that time, yes, my office, temporarily.

page [11] Q They were in your office, though. Is that correct?

A That's right.

MR. DOWD: Your Honor, we have nothing further of this witness.

MR. STREET: Your Honor, I have one question.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. STREET:

Q Sir, were any of these records that we have been referring to here made by you? Were any of the figures or the books or the records made by you, constructed by you?

A No, sir.

MR. STREET: That's all.

MR. DOWD: Your Honor, if I could be permitted one more question.

RECROSS EXAMINATION

BY MR. DOWD:

Q Do you utilize work papers in developing the information from the books and records of Mrs. Couch to put on the tax return?

A I didn't understand you.

Q Do you develop—Do you use work papers of your own? Do you take the information and put it on work papers and then eventually put the figures on the tax return?

page [12] A No, sir.

Q You don't use any work papers at all?

A No, sir.

Q Let me ask you, Mr. Shaffer, this is a copy of your Answer that was filed with this Court. Is this a copy of the Answer?

A Yes, sir.

Q Would you read paragraph ten of that Answer for the Court please?

A Paragraph ten?

Q Yes, please.

A "That he does not have nor has he ever had any work papers or other books, records, bank statements, cancelled checks, deposit ticket copies, or other pertinent documents pertaining to the tax liability of Lillian V Couch as his sole and exclusive property, which were created by his own efforts; and to the extent that he may have owned or created such documents, they were lost,

disposed of or destroyed long before service of said summons."

Q Do I take that to mean that you did have some work papers, the last phrase or sentence in that paragraph?

A No, sir.

Q How could they be lost, destroyed or disposed of, if you didn't have them in the first place?

A (no response)

page [13] MR. DOWD: I have no further questions, Your Honor.

THE COURT: All right. I notice here (You may be excused.) a motion to intervene on behalf of Mrs. Couch by her attorney, Mr. Rocovich. Is there any objection on the part of the Government?

MR. DOWD: No, we have no objection to the motion to intervene, Your Honor.

THE COURT: All right, the Court permits the intervention of Mrs. Couch in the proceedings, and we're ready for you to go ahead.

MR. STREET: Your Honor, I would like to call one more witness.

THE COURT: All right.

MR. STREET: Mr. Groves, please.

MR. DENNIS L. GROVES, having been called as an adverse witness on behalf of the respondent,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STREET:

Q Would you state your name to the Court, please, Mr. Groves?

A Dennis L. Groves.

Q What is your occupation, Mr. Groves?

page [14] A I'm occupied as an Internal Revenue Agent in Roanoke, Virginia.

Q Have you ever had any reason to come in contact with Mr. Shaffer, the defendant in this case?

A Yes, I have.

Q In connection with any books or records of a Mrs. Couch?

A Yes, and in regards to an examination of Mrs. Couch's books and records of her income tax returns.

MR. STREET: Your Honor, I ask that this witness be considered an adverse witness to the defendant.

THE COURT: Very well.

Q Did you examine these books and records of Mrs. Couch at Mr. Shaffer's office?

A To a certain degree, yes.

Q What do you mean, "to a certain degree?"

A Upon limitations there was an examination of

the taxpayer's records which were made available at Mr. Shaffer's office.

Q He did make them available then at his office for your examination?

A Yes, he did.

Q Did he ever object to you coming to his office and examining the books?

A No, sir.

page [15] Q At any time, to you examining the re-records at his office?

A Not to me individually. No, sir.

Q And how long would you say that you spent in his office examining these books at different times?

A I was there off and on for a period of, I would say probably two to three days; not necessarily in that sequence, but a period of two or three days, sir.

Q Did he make his office available for your use?

A Yes, he did.

MR. STREET: Thank you very much. That's all the questions I have, Your Honor.

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Groves, did you look at all the records that he had in the office?

A Yes, I looked at all the records that he furnished me. Yes.

Q That he furnished you?

A Yes, sir.

Q Was there any indication that there were more records?

A Sir, additional records were requested for a subsequent year under examination, and to date these records I have not seen.

page [16] MR. DOWD: I see. I have no further questions, Your Honor.

THE COURT: All right, Mr. Groves, you may be excused. Do you have any questions?

MR. ROCOVICH: Yes, sir.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ROCOVICH:

Q I believe you stated you examined the records over a two or three day period. Why did you stop examining the records?

A I haven't stopped.

Q Well, why did you see fit to request the assistance of Mr. Jennings?

A Due to certain findings which I encountered during my examination of those records.

Q Now which findings would they be?

A Pertaining primarily to indications of substantial understatement of income.

Q More specifically, what kind of indications?

MR. DOWD: Object, Your Honor. Some of

this information is prohibited by law from being given. 7213 prohibits an agent to—

THE COURT: Well, now, does this come within that ambit?

page [17] MR. DOWD: I think it does, Your Honor. I think he has said there were indications of fraud or irregularity. I don't think we ought to go any further.

THE COURT: "Understatement of income", I understood him to say.

MR. DOWD: Yes, Your Honor.

THE COURT: All right, let me hear your question again.

MR. ROCOVICH: All right.

Q What specific details led you to believe that the taxpayer had understated her income?

THE COURT: I believe I'll let him answer it, if he can, in substance, generally, not to go into details, because we cannot try that matter here today.

A Through an alternative tax computation, based on the information in the taxpayer's records, an indication of a substantial understatement of income was found

Q That's gross income, I suppose you—

A Understatement of gross income. Yes, sir.

Q What general area primarily led you to believe there might be such an understatement?

A Excessive spending over known receipts.

Q All right. Then you—How long after you suspected—Well, you say you called in Mr. Jennings because

page [18] you suspected some criminal possibilities. Is that correct?

THE COURT: He didn't say that.

MR. DOWD: He didn't say that.

THE COURT: You're putting words in his mouth.

MR. ROCOVICH: I withdraw that.

Q Why did you call in Mr. Jennings?

A Under the Internal Revenue regulations, under which I must work, when I find an indication of an understatement of income, I am required to report this to my superiors, and in turn, it is reported to the Intelligence Division.

Q Do you understand this regulation to mean that if you suspect a crime, you are supposed to turn this over?

A No, sir, I don't believe it says, "to suspect a crime." It says that if there is—if I find that there is some reason to believe that the income reported on the return is not correct as reported. My primary purpose is to determine the correct tax liability.

Q Well, how long after you suspected this deficiency, say, in the taxpayer's statement of gross income, how long did you continue to examine the records? When you said you worked on them two or three days, I was just wondering—

A This work was done previous to this—this finding. This—In other words, the work—the examination which I made of the records, my determination, based on the facts that

page [19] I had found while working in Mr. Shaffer's office on these days, led me to this conclusion. It was at this point that the case was referred to the Intelligence Division and my superiors.

Q Well, then you say you were there three days. Did you work on them for two days, then start to suspect some impropriety and then continue for another day, just to be sure that you were right?

A Basically, I would say this is correct. I wouldn't say I worked exactly two days before I suspected anything or a day and a half or three days. It was part of this two or three day period. At the moment, I don't recall exactly how many days I worked at Mr. Shaffer's office.

Q Then you proceeded a little further, confirming your suspicions.

A This is correct.

Q Right. So after the point at which you suspected some impropriety, you continued to work for a little while. Is that right, basically?

A I referred the information to my superiors at that point.

MR. ROCOVICH: Thank you.

MR. STREET: I want to ask one more question, Your Honor.

page [20] REDIRECT EXAMINATION

BY MR. STREET:

Q Mr. Groves, is it true, as Mr. Dowd stated here in his objection, that you suspected fraud before you

turned—before you called in Mr. Jennings? Was his statement correct?

A I wouldn't say necessarily that I suspected fraud. I found that there was, to me, a substantial understatement of gross income. It is not for me to determine whether this is fraud.

Q No, I didn't ask you if you thought there was fraud. I asked you if it was true—was his statement true, that you suspected fraud.

A This is true.

MR. STREET: That's all

MR. DOWD: We have no further questions, Your Honor.

MR. ROCOVICH: I would like to call Mr. Jennings.

THE COURT: Very well. Come around, Mr. Jennings.

page [21] MR. EDWARD F. JENNINGS, a petitioner in this action, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROCOVICH:

Q Mr. Jennings, what is your occupation?

A I'm a Special Agent with the Intelligence Division, Internal Revenue Service.

Q Who is your group supervisor?

A Robert Smoot.

Q Briefly, what is the mission of the Intelligence Division?

A To gather evidence and to make a recommendation based on that evidence, on the possibility of a criminal tax violation.

Q So then every case in which you are involved, involves a possibility of a criminal prosecution?

A Yes, sir.

Q And that's your sole function?

A No, sir.

Q What are your other functions?

A Well, in order to arrive at a conclusion as to a possibility of tax fraud, first—you first have to determine is the tax liability on the return correct, or is the return correct.

page [22] Q Right.

A Then that is a part of the ultimate determination as to whether or not there is fraud involved.

Q Then basically, if there wasn't—if there wasn't criminal fraud suspected, you wouldn't be involved. Is that right?

A That's correct.

Q Mr. Jennings, what is a case assignment sheet in the Intelligence Division?

A Well, it is a sheet of—It is a form that they prepare in Richmond, which contains our number, for bookkeeping purposes, and contains—if the case would be assigned to me, it would contain my name and the date that it was assigned and the source of the case.

Q And was a case assignment sheet prepared prior to your entry into this matter? Was that the way you became involved?

A As far as technically, exactly when that case assignment sheet was prepared, I just don't know at this time. However, we can be assigned an investigation while the case assignment sheet is being prepared. If the investigation has been authorized and my—I will have to guess at this. My guess is that that case assignment sheet had been prepared and given to me in this particular instance.

Q Well, what was the source of the case on that

page [23] case assignment sheet?

A The source of the case was Audit Division.

Q Say anything else as to why there was suspected fraud or—

A My best recollection is that it stated that there was an understatement of gross receipts.

Q All right. Basically, what is the difference between a Special Agent and an Internal Revenue Agent?

A An Internal Revenue Agent, according to my understanding, makes audits of income tax returns, and they are concerned with determining the correct tax liability of any given taxpayer. That's generally what they do.

Q Yes.

A My primary function is to investigate the possi-

bility of income tax fraud against the revenue of the United States.

Q Criminal fraud, that is, basically?

A Criminal fraud. Correct. Now, in conjunction with that, we investigate civil fraud also, but the primary function you asked, I believe.

Q All right. You are familiar with Internal Revenue News Release 941, aren't you, involving warnings to taxpayers?

MR. DOWD: I object to the relevance. I don't know how it is relevant here.

page [24] THE COURT: Well, I take it that it is a regulation or a statement by somebody who worked in the Internal Revenue Department, his views of what the taxpayer should be warned of. Is that it?

MR. ROCOVICH: Yes, sir. It is a release directing Special Agents to give warnings similar to *Miranda*.

(Thereupon the Court was handed the document.)

THE COURT: Well, did Mr. Jennings, as Special Agent, see Mrs. Couch?

MR. ROCOVICH: Yes. I just want to bring this out in further support of my contention that this is a criminal investigation which he was conducting.

MR. DOWD: Your Honor, we might be able to save some time here. We'd be happy to stipulate that Special Agent Jennings gave Mrs. Couch a warning similar to *Miranda* when he met with her.

That might save the whole thing. We have nothing—

THE COURT: Well, he wants to put this in the record, this direction of procedure that was enacted on November 26, 1968. You wish to put this in the record?

MR. ROCOVICH: Right.

THE COURT: And then you wish to question Mr. Jennings about it. All right. Go ahead. I'll

page [25] let that be filed Exhibit Number 1 for Mrs. Couch.

(Copy of IRS News Release IR-949, November 26, 1968, was received in evidence as Intervenor Respondent, Couch, Exhibit Number 1.)

Q Are you familiar with Internal Revenue Service News Release IR-949?

A I'm not familiar with that under that title, no. If I'm permitted to read it, I can tell you whether I'm familiar wih the context.

THE COURT: Yes, you may read it.

A (continuing) I'm aware that in some cases they —in some—Some people don't think that we are required to give the warning. Yes, I'm aware generally of what that contains.

Q All right. Did you give a warning to Mrs. Couch?

A Yes, sir.

Q Could you tell us basically what you warned her?

A I can tell you exactly what I warned her.

Q All right, if you would do that.

A This is a card which I carry in my credentials, and in this instance I had this card and read it to her. The first two words are, "Show credentials," which I did, and then I said, "As a special agent one of my functions is to investigate the possibility of criminal violations of the Internal Revenue Laws. In connection with my investigation of your tax

page [26] liability, I would like to ask you some questions. However, first I advise you that under the Fifth Amendment of the Constitution of the [United States] I cannot compel you to answer any questions or to submit any information if such answers or information incriminate you in any way. I also advise you that anything you say and any information you submit may be used in any criminal proceeding undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

THE COURT: Give that to the Clerk and let a photostatic copy be made and placed in the file as Exhibit Number 2 for Mrs. Couch.

(Copy of statement as read by witness was received in evidence as Intervenor Respondent, Couch, Exhibit Number 2.)

Q As you understand the Commissioner's regulations, at what point is an Internal Revenue Agent supposed to call for help, so to speak, or request a Special Agent be sent in?

A I can't really answer that question, because I don't know. It varies from agent to agent. I can give you an opinion.

Q Fine.
A That's all it would be.

Q All right.
A Generally, on the first indications of fraud.

page [27] Q Criminal fraud, that is.
A Fraud.

Q All right.
A It is up to the Special Agent to determine whether—whether these indications are fraud or not. This is part of our investigation.

Q Did you ever see any of the Couchs' records since you—Have you looked—Have you ever seen any of the Couchs' records?
A Yes, I have. May I clarify that—

Q Yes, certainly.
A —to some degree? I have seen what were identified to me as Couchs' records in a box. I have not seen any writings or anything of that nature. I have not examined them or perused them in any manner. I've only seen the records, and they were identified to me as Couchs' records in a box only.

MR. ROCOVICH: I don't have any further questions, Your Honor, at the moment.

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Jennings, under what authority do you have to issue an Internal Revenue summons?

A Well, our authority is given to us as a delegate of the Secretary of the Treasury.

page [28] Q I see. Is that pursuant to Section 7602 of the Internal Revenue Code?

A That's correct.

Q And is one of the purposes under that statute to determine the correctness of the tax return?

A Yes, sir.

Q Let me ask you, is that what you are doing here?

A Yes, sir.

Q Let me ask you, is Mr. Groves assisting you in this investigation?

A Yes, sir.

Q Why is he assisting you?

A Well, in accordance with our procedure, the Revenue Agent in a joint investigation is charged with the responsibility of determining the computation of the tax and the civil adjustments or civil features of the case.

Q If we could suppose for a moment, Agent Jennings, that—Let's suppose that this investigation was concluded. What possible results could come from the investigation, from this joint investigation with Revenue Agent Groves and yourself? What are the possibilities that could come out of it?

A There are—

Q Could there be no action at all?

A There are three possibilities; no action on our part as far as making a recommendation for prosecution; we

page [29] could continue in the case throughout, at which time we could make a recommendation with regard to the civil fraud penalty or not; and/or the other end of the scale is that we could recommend prosecution of the taxpayer for evading taxes.

Q So there could be no action taken. Is that correct?

A That's correct.

Q In other words, your examination could possibly exonerate the taxpayer. Is that correct?

A That's correct.

Q Of the suspicions.

A That's correct.

Q There could be an additional tax, a technical adjustment. Is that correct?

A That's correct.

Q There could be a criminal prosecution. Is that correct?

A Yes, sir.

Q Or there could be both. There could be a suit for civil liability and a criminal prosecution, could there not?

A That's correct.

page [30] Q Now, when fraud is suspected in a case, and suppose there is difficulty in really finding anything to confirm the suspicions, do you continue until you are satisfied that there is no fraud? In other words, what I am saying is: Isn't it true that the

Commissioner of Internal Revenue has got a right to satisfy himself that there is no fraud—

A Yes, sir.

Q —as well as that there might be fraud?

A Yes, sir. Yes, sir.

MR. STREET: Mr. Jennings, did you ever go—

MR. DOWD: Wait a minute. I'm not through.

MR. STREET: Excuse me.

MR. DOWD: Excuse me, Your Honor, I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. STREET:

Q Mr. Jennings, when did you see these books and papers that were reported to belong to Mrs. Couch?

A It was in the afternoon, between the hours of approximately 2:00 and 3:00 o'clock on August 15th, 1969.

Q And where did you see them?

A At the office at that time I understood was being occupied by Harold Shaffer and Emmett Sherrill.

Q Did you meet Mr. Shaffer that day?

page [31] A No, he was—he never did—We waited for him, and he never did show up.

Q Did Mr. Shaffer ever refuse to allow you to look at the books and papers in his office?

A Yes, sir.

Q When?

A The following Monday at approximately 8:30 A. M., August 18th, 1968.

Q August the 18th?

A. Yes, sir.

Q He refused to let you view them in his office?

A Yes, sir.

Q Did you ask to take the books out of his office at that time?

A My best recollection is that I did ask that, and I said also that if he wouldn't permit the records to be removed, that I had a microfilmer in the car that we could save som time if we took the microfilmer inside and microfilmed the records. This was denied.

Q Did you ask to view them without taking pictures? Did you ask to look at—to stay there in his office and look at them?

A Well, I can't say that I used those words. We were denied access to the records, and this is what we wanted. We were denied it.

page [32] Q But do I understand you correctly that you don't remember whether you asked him to sit there in the office and look at the records or not? Do you remember whether you asked him to allow you to remain there in the office and to look at the records, without taking pictures of them?

A My best reecollection is that we asked him—

Q Do you remember specifically?

A —if we could work on—work on the records,

and Shaffer replied that the taxpayer was going to get an attorney, and he couldn't let me see them.

Q He told you that he could not let you see them, period. Is that right?

A I believe that's right.

Q Are you sure?

A That's my best recollection.

Q Can you be positive?

A I can't be positive. No.

MR. STREET: Thank you, sir.

THE COURT: All right. Thank you, Mr. Jennings. You may take your seat.

Any further evidence?

MR. STREET: Your Honor, I would like to put Mr. Shaffer back on in rebuttal to that witness who was called by Mr. Rocovich.

THE COURT: All right.

Shaffer — redirect

Shaffer — redirect

page [33] MR. HAROLD L. SHAFFER, the respondent in this action, having previously been duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. STREET:

Q Mr. Shaffer, do you remember Mr. Jennings coming to your office the first time?

A Yes, sir.

Q Were you there?

A Well, the first time he came, I don't think that I was there.

Q The second time that he came, were you there?

A Yes, sir.

Q And what did he request of you at this time?

A He said at the time that they had facilities at the Internal Revenue Service for microfilming and photocopy machines and what have you, and he wanted to take the records to the Internal Revenue Service and work with them.

Q Did you understand him ever to ask you to view the records in your office?

A. No, sir.

Q Would you have allowed him to look at them in your office if he had asked?

A Yes, sir.

MR. STREET: That is all the questions I have.

[page 34] MR. DOWD: I would like to ask a question.

RECROSS EXAMINATION

BY MR. DOWD:

Q You stated earlier you had possession of these records. Right?

A Yes, sir.

Q And while under a subpoena that was issued to

you by Special Agent Jennings, you turned them over to Mr. Rocovich. Is that correct?

A That's right.

Q Why was that summons issued to you, do you know?

MR. STREET: Your Honor, I object to this cross examination. It does not relate to the questions I asked him on direct.

THE COURT: Well, anyway, he wasn't the one that issued the summons. That would be up to the Government to say why it was issued, wouldn't it?

MR. DOWD: I'll put it another way, Your Honor.

Q Isn't it a fact that the reason the summons was served on you was because you wouldn't produce the records and documents as requested by the Special Agent?

MR. STREET: Your Honor, I object to this on the same basis. He doesn't know why it was issued.

THE COURT: Well, I will let him answer the question.

pages [35-36] A I think it was. Yes, sir.

Q And it is a fact that on September 2nd, the date of the return date, you did not tell him you didn't have the records, you told him you couldn't produce them. Isn't that correct? That's all you told him. You just refused to produce them at that time. Isn't that correct?

A I didn't understand your question.

MR. STREET: Your Honor, I object. He

has already answered that question once and said he couldn't remember.

THE COURT: You wish to ask it again?

MR. DOWD: Yes, I do, Your Honor.

THE COURT: All right, go ahead.

MR. DOWD: Your Honor, we'll let it go. It's not important.

THE COURT: All right, you are excused.

MR. STREET: Your Honor, that is all the evidence we have.

MR. DOWD: We have some argument, Your Honor.

THE COURT: Very well.

MR. DOWD: Your Honor, I do not believe you had an opportunity to see the back of this summons.

THE COURT: Yes, I have.

MR. DOWD: This is different than the one you have, Your Honor.

page [37] THE COURT: Oh, that is not the one filed?

MR. DOWD: Yes, this is the one given to the taxpayer, Your Honor. We have already shown it to counsel.

THE COURT: Do you wish to file it in the record?

MR. DOWD: Yes, Your Honor, since we don't have the back. Oh, you do have the back. If we could attach it to—

THE COURT: Let it be filed as a part of Government Exhibit Number 1. Is that right?

THE CLERK: Yes.

(Document was attached to Government Exhibit 1.)

MR. DOWD: Your Honor, what we have here is a very — is a very simple thing actually. You have —7602 of the Internal Revenue Code is a statute which permits the Commissioner or his delegate, the Secretary or his delegate, rather, more specifically, the Commissioner of Internal Revenue and his agents, to examine tax returns to check the correctness of them, because very simply, if the Commissioner of Internal Revenue could not check the correctness, that is, the documents supporting—

THE COURT: Well, that's not — Nobody disagrees with that, do they?

MR. DOWD: Well, I don't know, Your Honor. I'd like to explain this, because I think it will take on — I'd like to explain this, if I could, so that we could handle this

page [38] matter of a question of a criminal investigation. What I'd like to say is that statute is not limited, and that the Special Agent and the Revenue Agent have authority under that statute to issue the summons and to examine the books and records, notwithstanding the fact that there may later be a criminal prosecution. As was stated in the case of *Boren v. Tucker*, the fact that there may be a prosecution doesn't necessarily mean there really will be. As we pointed out with the Special Agent on the stand, there are many possibilities that may come out of a criminal—this investigation

THE COURT: What I would first like to know is this: What were the duties of Mr. Shaffer here, the CPA, with reference to the papers? In other words, does—

MR. DOWD: The duties of Mr. Shaffer, Your Honor—

THE COURT: Wait just a minute. Does the Government have a right to issue the subpoena to the person who is holding papers for someone else's benefit and take them over without her consent?

MR. DOWD: Yes, Your Honor, the Government does. Section 7602 states:

> "To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of

page [39] the person liable for tax required to perform the act, or any other person the Secretary or his delegate may deem proper, . . ."

This is in 7602, subparagraph (2), Your Honor. This statute was explained in full to Mr. Shaffer, not only on the face of the summons, but on the back of the summons, and the incumbent penalty—

THE COURT: All right. Now, what do you want done about Mr. Shaffer's case? I understand it all.

MR. DOWD: Well, Your Honor, we're in a very difficult situation, because Mr. Shaffer does not have possession of the books and records. Apparently, Mr. Rocovich does, based on the testimony of Mr. Shaffer.

Your Honor, since Mr. Rocovich is part of this proceeding, we'd like to ask this Court to compel Mr. Rocovich to put these records back where they started when this subpoena was issued. For example, Your Honor, if the Congress issued a subpoena, say to Mr.

Shaffer to produce testimony and records, I'm sure Mr. Shaffer wouldn't disregard the will of Congress, which is what he has done here.

THE COURT: What benefit would it be to put them back in his hands, when what you really want is to turn them over to Mr. Groves and Mr. Jennings for investigation?

MR. DOWD: That's correct, Your Honor.

THE COURT: Well, I'm willing to do that. I'm

page [40] willing to do that. The question is: What are you asking about Mr. Shaffer's case?

MR. DOWD: Mr. Shaffer's case, Your Honor, if— if the Government can get the records, which is all we're interested in here, and his incumbent testimony—

THE COURT: All right.

MR. DOWD: —we have no — we have no complaint against Mr. Shaffer. Now, if we cannot, then we would have to feel free to ask this Court for a civil contempt order.

THE COURT: I understand your position, and I'll give Mr. Rocovich an opportunity to reply.

MR. DOWD: Very well.

THE COURT: Mr. Street, I take it there is no necessity for you to reply, because from what Mr. Dowd has said, we will dismiss the proceeding as to Mr. Shaffer.

I do want to say this, that I think that Mr. Shaffer acted in disregard of the summons. I think that he should have waited, (Here it is a matter that is coming into Court.) and let us say whether or not he should have turned the papers over. He had a summons

staring him in the face, and instead of running with the papers to the lawyer, he should have asked for the guidance of the Court in answer to a properly executed summons.

So, I am willing to go along with that.

Now, Mr. Rocovich, I have already indicated--

page [41] MR. STREET: Then with the understanding that my client is dismissed, I have nothing further.

THE COURT: Well, I say I think that that is what I will do. Now, I am willing to hear Mr. Rocovich. I have already indicated to Mr. Dowd that I thought that the papers ought to be produced. Now, if you can convince me otherwise, go ahead.

MR. ROCOVICH: All right. Well, I agree with Mr. Dowd on 7602, that it's clear that the Internal Revenue Service can examine returns for correctness. That's not in issue. If the Government wants to grant my clients immunity, as they are entitled to do, from Federal criminal prosecution, I'm sure they'd be glad to turn the records over.

However, I think it has been clear — Mr. Groves stated that he turned the case over when he suspected criminal fraud. Mr. Jennings testified that his job in the Internal Revenue Service is to investigate the criminal fraud, and they suspected criminal fraud. The Internal Revenue Service Bulletin 949 outlines the procedure for a Special Agent when he suspects criminal fraud, that he must give a *Miranda* type warning. Why give a warning if the person is not compelled to incriminate himself, if you had no criminal proceedings?

I think it's clear from Mr. Shaffer's testimony that every record involved, all the records, were solely

and exclusively the property of Mrs. Couch. There weren't any

page [42] work papers. None of these records were Mr. Shaffer's.

Certainly there are numerous cases on the point that a person's personal records are just as entitled to protection under the Fifth Amendment as is their verbal testimony. Certainly if that were not the case, the Fifth Amendment would have no meaning at all. To me—Well, the *Frank J. Sullivan* case, a 1923 case, makes the point that your records are as entitled to protection from self-incrimination as your testimony.

Certainly after the focal point of the investigation by the Justice Department and Internal Revenue Service, after it has shifted to a criminal investigation, after it has reached that point in our adversary system, certainly the taxpayer is entitled to the privileges extended by the Fourth and Fifth Amendments to the Constitution. If that weren't the case, then we would be extending to bank robbers and murderers and rapists greater protection than we extend to a person who is being investigated for violating the Internal Revenue Laws, and that would certainly be an anomaly, which I don't think Congress intended, and I think to the extent that Congress so intended, it violates the Fourth and Fifth Amendments to the Constitution.

THE COURT: As the Court has previously indicated, the Court feels that Mr. Shaffer was more or less a stakeholder of the papers, as an accountant for the taxpayer,

page [43] Mrs. Couch.

I can conceive of the fact that he was thrown

in the dilemma of the Government wanting to see the papers in his hands, and the lady, whose papers they were, wanting them returned to her or her attorney. I feel that the appropriate thing for Mr. Shaffer to have done on receipt of that notice was to ask the guidance of the Court before doing anything to the papers. Nevertheless, we must look, with some tolerance, to the fact that he returned the papers to the source from which they came, and I don't see that he has any antagonistic views toward the Government's investigation, and so I will permit him to be dismissed.

Now, as to Mrs. Couch, it has always been my understanding that every taxpayer of this country, not just one, but everyone, is required to keep them for three years. The purpose of keeping those records is for the Government to have the right to come there and to look them over; yours, his, mine, theirs, everyone's. The mere fact that a Special Agent is brought in on the case, certainly doesn't change it to the point of permitting the taxpayer to say, "Well, I'll just keep my documents. He can't tell what I've made. The Government can go searching, but they're not going to find out anything from me." That isn't the basis of the tax law.

It is a requirement that every taxpayer shall

page [44] keep accurate records. I do not mean by that, pinpointing penny and dime stuff, but substantially accurate records showing what their income has been, gross income and net income. If we didn't have that requirement, how could you enforce any tax law?

As I say, the fact that the Special Agent of the Intelligence Division was brought in, doesn't necessarily mean that the taxpayer is going to be indicted. Many, many cases are doubtless handled by the Intelligence Di-

vision assisting the Audit Division, in which indictments are never made.

As a matter of fact, it would have to go through a recommendation to the Justice Department and to the United States Attorney before being presented to a grand jury. So, I cannot see that we are violating the basic, fundamental, constitutional rights of any taxpayer to require them to produce their records. If that does violate them, then you may as well wipe off the requirement of tax investigation and place it on everybody's honor to do what they think is right and fair by the Government in the preparation of their tax returns.

It may be true that the primary function of the Intelligence Division is to investigate, looking primarily for fraud, but fraud may be of the civil type; it may be of the criminal type, and it would seem to me that if a taxpayer

page [45] has nothing to hide, that they would want to bring their papers out in the view of the cross examiner's eyes and to lay them on the desk, and as the old saying is, "put the cards on the table," and let's see.

She may have a proper explanation of what Mr. Groves referred to as "apparently an underestimate or statement of gross income." She may have a sufficient reason for it. Even after the indictment, if there was one made, and that has got to come in here in this courtroom and be returned by twelve good men and women and by the Court, whether there is any violation of the—criminal violation of the tax laws.

So, my feeling is, and my order is, that Mrs. Couch within ten days from this time, (If that isn't sufficient—or twenty days—I'll make it twenty days, be-

cause if you wish to appeal from the order, it will give you time to do it.) shall produce for the inspection of the Internal Revenue Service, her records that relate to her income taxes. I don't know what years, but I take it for the last two or three.

MR. ZIMMERMAN: 1964 through 1968, Your Honor.

THE COURT: 1964—

MR. DOWD: Through 1968, Your Honor.

THE COURT: —through 1968. Well, now, let me ask you; 1964 is beyond, unless there was an ex tension of time—Unless there is an extension of time, 1964 would be

page [46] going back too far. Was there a waiver or an extension of time granted?

MR. DOWD: Well, Your Honor, 1964 would only be considered as it may bear on—for background information, as it may bear on '66, '67 and '68, which I believe are the prime years they are concerned with.

THE COURT: Well, I didn't know that the taxpayer was required to keep records except for three years, but I realize that the Government has a right on fraud to go back further than that.

MR. DOWD: Yes, sir.

THE COURT: But if she only had records for three years, would there be any criticism?

MR. DOWD: No, Your Honor. We couldn't do anything about it.

Your Honor, if I could ask you, as part of your order; as I understood Mr. Shaffer would be willing to testify. I know you are going to dismiss him, but is that agreeable, because we'd like him ordered to testify with regard to these matters.

THE COURT: Well, that's another proceeding. You summon him in, and if he doesn't, then we will consider that.

MR. DOWD: Well, we have, Your Honor. It is part of this summons.

page [47] THE COURT: It is part of this summons?

MR. DOWD: Yes, Your Honor. We asked him—

THE COURT: Is he willing, Mr. Street?

MR. STREET: Yes, Your Honor, he's willing to testify.

THE COURT: That's all right.

MR. DOWD: Thank you, Your Honor.

THE COURT: Anything else, Mr. Rocovich?

MR. ROCOVICH: Well, Your Honor, I was going to oppose the order going into back years. The Statute of Limitations has run on those. It doesn't seem to me to be justified, but—

MR. DOWD: The Statute of Limitations is no bar, Your Honor, when they are checking fraud.

THE COURT: I understand it isn't. But the requirement for the taxpayer to keep those records is effective here.

MR. DOWD: Yes, Your Honor, if the taxpayer does not have the records—

THE COURT: Well, all I can do is require her to produce the records for '66, '67 and '68, as I see it. Now, if she has the other records—As you say, fraud investigations can go back even more than three years. If she doesn't have them, I can't require her—

MR. DOWD: No.

page [48] THE COURT: —to produce something she doesn't have.

MR. DOWD: Yes, Your Honor. If you could just require her to have the records that she does have for those years, it would be perfectly satisfactory with us.

THE COURT: All right. You prepare the order this afternoon, and I'll sign it.

You wish to take a prompt appeal?

MR. ROCOVICH: Yes, Your Honor, I'll take a prompt appeal.

THE COURT: All right. Well, recite in the order, Mr. Dowd, that Mr. Rocovich indicated his desire and has noted an appeal, and I take it that we should extend the time more than twenty days.

MR. DOWD: Well, we'll agree to thirty days.

THE COURT: All right. If that isn't sufficient, we can change it and modify it.

Here are the papers.

All right, Court is adjourned for the day.

(Thereupon Court was adjourned for the day.)

REPORTER'S CERTIFICATE

I, Barbara Jane Floyd, hereby certify that I am a duly appointed official court reporter for the United States District Court for the Western District of Virginia.

I hereby further certify that I was present in the United States District Court for the Western District of Virginia, Roanoke Division, Roanoke, Virginia, on February 2, 1970, and in the regular course of my duties reported the proceedings held in the case of United States of America and Edward F. Jennings, Special Agent, versus Harold L. Shaffer and Lillian V. Couch, Civil Action Number 70-C-3-R.

I further certify that the foregoing is a true and correct transcript of the proceedings held in the above case on the above date.

Barbara Jane Floyd
Barbara Jane Floyd
Official Court Reporter
United States District Court
Western District of Virginia

Given under my hand this the 11th day of March 1970.

Form 2039
(Rev. Nov. 1964)

U. S. Treasury Depaartment—
Internal Revenue Service

SUMMONS

In the matter of the tax liability of
Lillian C. Aleshire, a/k/a Lillian V. Couch
3102 Williamson Rd.
Roanoke, Va.

Internal Revenue District of Richmond
Period(s) 1964-1968 inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Harold L. Shaffer
2233 Cantle Lane, S.W.
At: Roanoke, Virginia

GREETINGS:

You are hereby summonsed and required to appear before E. F. Jennings, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Place and time for appearance:

At your office, 1524 Peters Creek Road, N.W., Roanoke, Va., on the 2nd day of September, 1969 at 9:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 18th day of August, 1969.

ORIGINAL

Signature: E. F. Jennings
Title: Special Agent

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I hereby certify that I served the summons on the reverse hereof

Date Summons Served *(Day, month, year)* Time
8-18-69 8:47 a.m.

How Summons Was Served *(Check one)*

☐ I handed an attested copy thereof to the person to whom it was directed,

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

Signature E. F. Jennings Title Special Agent

COPY BOUND CLOSE IN GENTE

Supreme Court of the United States

No. 71-889 ~~October Term, 19~~

Lillian V. Couch,

petitioner,

v.

United States and Edward F. Jennings, etc.

ORDER ALLOWING CERTIORARI. Filed April 3 , 1

The petition herein for a writ of certiorari to the United States Co

Appeals for the Fourth ---------- Circuit is granted.

FILE COPY

FILED
APR 4 1972

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
JANUARY 10, 1972
CERTIORARI GRANTED APRIL 3, 1972

MARTIN, HOPKINS AND LEMON
Counsel for Petitioner
Sixth Floor, Boxley Building
Roanoke, Virginia

CLAUDE D. CARTER
JOHN G. ROCOVICH, JR.
GERALD A. DECHOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

BRIEF ON THE MERITS FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-3 of the Single Appendix. The opinion of the District Court for the Western District of Virginia is set forth at page A-6.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254. The petition for certiorari was filed within the ninety day period fixed by law from the judgment of the Circuit Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers, or other data.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry:

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may

deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

QUESTIONS PRESENTED

1. Whether a taxpayer by invoking his 5th amendment privilege against self-incrimination and his 4th Amendment privilege of freedom from unreasonable searches and seizures may prevent the enforcement of an Internal Revenue Service ("IRS") summons requiring taxpayer's tax consultant to produce the personal records of the taxpayer where the records were in the naked possession of the consultant when the summons was served on him but where the taxpayer had directed him to deliver the records to the taxpayer's attorney

before the issuance of the summons. (R6, 32) The question of whether the tax consultant would be required to deliver his own records or his worksheets prepared from the taxpayer's records is not in issue.

2. Whether the use of a manifestly civil statute to subpoena records is permissible in a tax case in which criminal fraud has become the dominant aim of the investigation being conducted by the government.

STATEMENT OF THE CASE

During the summer of 1969, Dennis L. Groves, ("Revenue Agent") an Internal Revenue Agent, commenced an investigation of the income tax returns of Mrs. Lillian V. Aleshire Couch (hereinafter referred to as "Taxpayer" or "Petitioner") for the years 1964 through 1968. He enlisted the assistance of Harold L. Shaffer, ("bookkeeper") a tax consultant, and long time employee of Mrs. Couch. Bookkeeper possessed certain work papers and cancelled checks prepared by Taxpayer in her own handwriting which she had delivered to him in order for him to prepare her tax returns. Bookkeeper had not transferred any of the information contained in Taxpayer's records to his own work sheets. During the course of his examination, Revenue Agent determined that there was potential criminal fraud involved in the case and requested the assignment of a Special Agent to aid in the investigation.

Mr. Edward F. Jennings, ("Special Agent") a Special Agent with the Intelligence Division of the Internal Revenue Service, was assigned to the case. Special Agent observed the results of Revenue Agent's investigation and Taxpayer's records, and then proceeded

to Taxpayer's residence with Revenue Agent, where he introduced himself, showed his credentials, and advised Taxpayer of her 5th Amendment rights and of her right to have an attorney present during the questioning.

Special Agent, on August 18, 1969, proceeded to Bookkeeper's office to either take or photo copy Taxpayer's records. In the meantime, Taxpayer had directed Bookkeeper, her tax consultant, to turn the records belonging to her over to no one but her attorney. (R32) Upon Bookkeeper's refusal to deliver the records, Special Agent issued a summons directing Bookkeeper to produce the records at 9:30 A. M. on September 2, 1969.

When Special Agent arrived at 10:10 A. M. on September 2, 1969 at Bookkeeper's office, he found that Bookkeeper had already turned the records in question over to Taxpayer's attorney, John G. Rocovich, Jr.

On January 7, 1970, the United States of America instituted proceedings to judicially enforce the summons. This appeal arises from an order of the United States Court of Appeals for the Fourth Circuit affirming an order of the U. S. District Court for the Western District of Virginia directing John G. Rocovich, Jr., Attorney, to produce the books and records in question.

SUMMARY OF ARGUMENT

The probe of Petitioner by the IRS was essentially a criminal one; thus, she is entitled to the protection of the 4th and 5th Amendments. The procedures adopted by the IRS as to giving the Petitioner a *Miranda* warning with the entry of a Special Agent into the case lead to the conclusion that at that point the IRS considered

the case a criminal one by its own definition. Once having established rules and regulations which import a color of criminality to a case the IRS is bound by the dictates of due process to abide by that definition. In any event, the unique circumstances of this particular investigation demonstrate that the main interest of the IRS in obtaining the Petitioner's records was to pursue a criminal prosecution.

The 5th Amendment to the U. S. Constitution grants the Petitioner the right to be free from being compelled to incriminate herself in any manner. The private records of a taxpayer fall within the scope of that privilege and are immune from process whether in the taxpayer's personal possession or in the possession of an employee of the taxpayer retained to prepare income tax returns. The 4th Amendment prevents the IRS from abusing process to reach documents protected from disclosure by the 5th Amendment.

In the case at bar the IRS has utilized a civil statute to pursue a criminal probe. As the civil law does not adequately afford the Petitioner the opportunity to assert her constitutional rights as would the criminal law, the statute has been misused and, hence, the summons sought to be utilized to ferret out evidence is inappropriate for the purpose and unavailable. The summons should, therefore, be quashed. If the IRS is permitted to usurp the rights of a taxpayer when he delivers his private records to an expert to formulate data into a tax return, then the 5th Amendment will become an empty promise. The complexity of the tax law requires individuals to seek advice; to strip a citizen of his rights by reason of the heavy burden placed on him by the gov-

ernment is exactly the result prohibited by the 5th Amendment.

ARGUMENT

I.

The investigation by the Internal Revenue Service into the affairs of petitioner was an essentially criminal one at the time the IRS summons issued seeking production of petitioner's records.

A.

Although the IRS has consistently argued that the case at bar presents only the possibility of a criminal charge while retaining a predominately civil character, your petitioner points to the fact that certain procedures adopted by the IRS require that the investigation be considered a criminal one. In "IRS News Release No. 949" of November 26, 1968, the IRS advised the public as follows:

> "Changes in the procedure for advising taxpayers of their rights during an investigation conducted by a Special Agent of the IRS Intelligence Division were announced today by the Internal Revenue Service.
>
> The new procedure goes beyond most legal requirements that are designed to advise persons of their rights.
>
> One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that

anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding. Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary state.

IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before an interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U. S. Comissioner."

The testimony of Special Agent (R 25, 26) discloses that the petitioner was given the same basic warning as contained in the news release. The petitioner contends that by the definition established by the IRS the investigation became a criminal probe. Even if the IRS definition of a criminal proceeding is much more liberal in scope than the trend of modern legal theory, your petitioner contends that once having established a substantive rule the IRS is bound to it by the dictates of due process. The *Miranda* type warning required by the news release

on a Special Agent's contact with a taxpayer would be totally devoid of meaning if the IRS were permitted to circumvent it by claiming that its investigation is wholly civil and that it may proceed exactly as it chooses as if the warning had never been given.

The IRS must scrupulously observe the rules, regulations, and procedures it has established or the courts will strike them down, *U. S.* v. *Heffner,* 420 F2d 809 70-1 USTC 9152 (1970) following *United States ex rel Accardi* v. *Shaughnessy* 347 U. S. 260 ('954). While your petitioner does not deny that the IRS did follow its preliminary procedures in the case at bar, she challenges the IRS claim that it is not bound to the definition and impact that necessarily devolve from the utilization of those particular procedures. The IRS claims by virtue of its actions, that the delivery of a *Miranda* warning does not make the probe a criminal one and that it is still free to operate as if the case were wholly civil. If that interpretation of the impact of the IRS warning procedure is correct then the warning is totally devoid of meaning and its delivery only an exercise in futility. The petitioner contends that the delivery of a *Miranda* warning to her emphasizes that the IRS has overtly stated by definition that the criminal aspects of its inquiry outweigh the civil ramnifications. The IRS having elected to pursue a criminal probe should not later be permitted to conveniently claim the investigation is only civil in order to circumvent the very rights outlined to petitioner in the warning to her. When the warning has been administered the petitioner is immediately clothed with the full protection of the 5th Amendment, whether or not under other circumstances an investigation would be considered criminal at that point, and as the warning states, "the taxpayer

... cannot be compelled to incriminate himself ... by producing any documents".

B

In the case at bar, the finger of accusation had already turned toward the petitioner before the Special Agent appeared. The obvious goal of the subsequent investigation by the Special Agent was to discover further evidence to substantiate the investigating Agent's belief of the existence of criminal fraud (R 19, 20). The Petitioner maintains that at the time the IRS issued the summons to the bookkeeper, its main purpose was the conduct of a criminal investigation. The finger of accusation turned toward the Petitioner when the investigating agent proceeded past the point in his investigation when he suspected fraud in order to substantiate his suspicions as he testified that he did for three days (R 10, 20). Once the suspicions of the investigating agent were substantiated, he then referred the case to a Special Agent to confirm his analysis. In the circumstances of the case at bar it is apparent that the probe had become a criminal one before the entry of the Special Agent. When the probe became manifestly criminal in nature, the 5th Amendment was the petitioner's shield from self-incrimination and the IRS may not avoid it by trying an end run around her defenses by claiming it was conducting a simple, good faith civil investigation. Of course, the petitioner continues to assert her willingness to produce documents if the IRS will give its assurance that the case is purely civil and forego a criminal thrust.

II.

The 5th Amendment to the United States Constitution protects a citizen from producing evidence to incrim-

inate himself. The 4th Amendment to the United States Constitution prevents the government from abusing process so as to conduct an illegal search or seizure to gain testimony or evidence protected by the right of a citizen to be free of self-incrimination. In this sense the two amendments virtually run into one another.

A.

The petitioner alleges that the IRS is attempting to narrowly define the perimeter of her rights under the 4th and 5th Amendments to the United States Constitution. She contends that a taxpayer's private records are the written testimony of the taxpayer and the government may not obtain that testimony without the taxpayer's consent in aid of an investigation which has become criminal in nature. For a number of years Petitioner has had her tax returns prepared by Shaffer (Bookkeeper). In order to facilitate the task, she delivered her personal books of account, cancelled checks, and daily register to his office. All of these documents were written in petitioner's own longhand and had been personally prepared by her. Bookkeeper utilized the data directly and did not prepare any work-sheets of his own. He did not own any of the materials and always held and stored them subject to petitioner's right of ownership. The IRS contends that the petitioner cannot assert her 4th and 5th Amndment rights to prevent it from obaining production of the records as the documents were not in her possession. If the records sought were in the possession of taxpayer it is clear that those records would be immune from process as falling within the ambit of the 5th Amendment. The landmark case of *Boyd* v. *U. S.* 116 US 616 (1886) reasoned that the personal records of an individual are the testimony of that individual and are

protected by his right to befree from self-incrimination. The IRS seeks to destroy that privilege the instant ownership and possession separate. In a complex, modern society the Petitioner contends that destruction of the privilege under those circumstances would strip the meaning from the 5th Amendment.

The Petitioner believes that the 5th Amendment prevents the IRS from obtaining her testimony, her records in order to force her to incriminate herself. If the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost. The records though in the hands of a retainer are still the testimony of the petitioner. The retainer canneither add nor subtract from the value of the documents. He is using them only by the direction of the taxpayer for a specific purpose without altering them one iota. The ultimate goal of the IRS remains a quest for the testimony of the petitioner herself. It would be naive to think that somehow the character of the testimony had changed by the mere transfer of petitioner's records from her hands to those of a hired factor. The prohibition stated in *Boyd* v. *U. S.* (*supra*) remains and as was said there at 861, "any forcible and compulsory extortion of a man's own testimony or his private papers to be used a evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other." The Court does not there premise its decision on the physical location of private papers; the ban prohbiting their use against their owner is total. The courts have frequently prevented the use of a man's own papers gainst him in a series of cases

since *Boyd* v. *U. S.* (*supra*), although in most of these instances possession and ownership have remained simultaneous, for example, *U. S.* v. *Cohen* 388 F2d 464, 68-1 USTC 9140 (CA9 1967), *U. S.* v. *Judson* 63-2 USTC 9658 (CA9 1963) *Hill* v. *Philpott* 445 F2d 144 71-1 USTC 9415 (CA7 1971). In *Stuart* v. *U. S.* 416 F2d 459 69-2 USTC 9630 (CA5 1969) the Court prohibited the IRS from reaching the private records of a taxpayer when in the hands of his accountant. The records had been delivered earlier to the accountant for the government's case in examining them. The court in essence held that the private records of the taxpayer remain surrounded by his privilege in spite of the fact that the records are not in his possession.

The right of a taxpayer to intervene and object to a summons directed to his accountant seeking the private records of the taxpayer was reviewed in *U. S.* v. *Graf* 371 F2d 67 (CA6 1967). There the court permitted the IRS to obtain the records but only in its assurance that no criminal action would ever result. The opinion infers a different result would obtain if a criminal prosecution were in the wings as in the case at bar.

In the instance litigated thus far, courts have been prone to protect the records of an individual from forced production for use against the owner when the documents happen to be in the possession of another. In *U. S.* v. *Guterma* 272 F2d 344 (CA2 1959), Guterma, the taxpayer, kept his personal records in a safe on Jacobs' premises. The IRS directed a summons to Jacobs ordering him to deliver up the records in his possession. Guterma intervened and asserted his 4th and 5th Amendment rights. The court appropriately cut through the facade of mere possession and held that ultimately Guterma

himself was the object of the summons. The constitutional intent to throw a protective screen around the individual is the fundamental factor. See also *U. S. and Weaver* v. *Kleckner* 273 F. Supp. 251, 67-2 USTC 9536 (1967).

The basic legal privilege emerges that the owner, the individual to whom the summons is ultimately directed, can quash a summons which has been served on another party who is a naked possessor of the first party's own records. The dilemma in such a situation can easily be resolved by asking "If the papers were in the hands of their owner would they be privileged?" If the answer to the question is "yes" then the government should not be allowed to circumvent the rights of the owner for the sole reason that ownership and possession do not happen to coincide in one individual at the time the summons is served. The petitioner concedes that the IRS can reach records belonging to another though in the hands of a taxpayer under investigation, in certain circumstances. *Deck* v. *U. S.* 339 F2d 739 (1964).

The basic principle that a subpoena should be directed to the owner rather than a naked possessor has also been recognized in *Schwimmer* v. *U. S.* 232 F2d 855 (CA8, 1956). Attorney Schwimmer had closed his law offices and stored his files together with those of his clients at the Dean Rubber Manufacturing Company. In the course of an investigation into alleged bribery and tax matters, the government directed a subpoena to Dean requiring that it deliver up all of the records in its possession. Schwimmer thereupon intervened asserting his right of freedom from self-incrimination. The Court decided that the subpoena was ultimately directed to Schwimmer himself although it was technically served on

Dean. Schwimmer, therefore, had a right to intervene and was able to successfully assert his 4th amendment rights. The Court looked to the rights of the owner and did not become confused by the happenstance of mere possession saying, at 861, "Schwimmer legally had such possession, control, and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third party naked possessor to produce and deliver them." The case at bar does not materially differ from Schwimmer. In each the actual owner of the document should not be deprived of substantial rights when he has entrusted the records to another without transferring ownership.

Petitioner has never transferred ownership of the records to bookkeeper, and bookkeeper's behavior and testimony (R 9, 10) disclose that he never considered he was anything more than a mere possessor. He used the records to construct tax returns but never gained any incidents of ownership. The IRS contends that if questioned about the returns he would have had to utilize the documents but that is irrelevant. The documents were susceptible at any time of being taken from him, as they in fact were, which would leave him with nothing but what he could reconstruct from memory. The bookkeeper was a naked possessor and in essence his situation does not differ from those of the possessors in *Guterma* (supra) or *Schwimmer* (supra). Nor should the fact that he observed the records be relevant as he never touched them so as to change their character or their ownership. The records were always those of petitioner.

C.

The reliance of the government on *Donaldson* v. *United States* 400 U. S. 517 (1971) is clearly misplaced. At 522-523, Mr. Justice Blackman sets forth a fact situation identical to the case now at bar and states that the Court expressly excepted that situation from its decision. Your petitioner reiterates in the case at bar, her records in which she has a proprietary interest were in the hands of her retainer. In *Donaldson,* the IRS sought records of Acme prepared for Acme's use by Acme's accountant although relating to taxpayer, Mercurio, who attempted to prevent their production. Mercurio had not constructed the records nor did he own them, nor did he ever place them in another's hands.

The sections of the Internal Revenue Code under consideration are civil laws, not criminal ones.

A.

The IRS has used a civil statute to facilitate a patently criminal investigation and has misused the law. The civil law does not provide necessary safeguards present in the criminal law to protect the rights of the accused.

The Trial Court did not have jurisdiction as the use of Internal Revenue Code Section 7402 and Section 7406 in the case at bar was a manifestly criminal one while the intent of the Sections is to provide for actions manifestly civil in nature with only possible criminal overtones.

The case at bar had clearly progressed to the point where its criminal nature over-shadowed any actual civil

investigation; therefore, the summons issued under Sections 7402 and 7406 of the Internal Revenue Code of 1954 was misused as the statute is a civil one, not a criminal one. This Court in *Donaldson* v. *U. S.* et al 27 L Ed 2d 580, 400 US 517, 91 SCt 534 (1971) laid out certain guidelines for the use of the summons authorized by the above cited sections of the Internal Revenue Code which have not been adhered to in the case at bar. Conceding for the moment, that this case should be measured by the *Donaldson* yardstick, your petitioner alleges that the IRS did not act in "good faith" in issuing the summons and that the clear purpose of the summons was to obtain evidence for use in a criminal prosecution. If there was any motive for discovering the supposed civil liability of the petitioner its importance had been virtually reduced to a nullity at the point in time when the summons was issued. The Court in *Donaldson* (Supra) recognizes the validity of a summons issued under Sections 7604 and 7606 where the purposes of the summons are civil with only the possibility of a criminal prosecution if the summons is issued in "good faith" and prior to a recommendation for prosecution. The petitioner contends that the action of the government agent in his carrying investigation beyond the point where he was merely suspicious of fraud to the point where his suspicions were confirmed (R 19) flaunts the rule enunciated in *Donaldson* (Supra) and constitutes the use of the section for the substantially single purpose of obtaining evidence for a criminal prosecution. The technicalities of the IRS procedure as to calling in a special agent are generally not crucial for the purposes of determining when the case becomes criminal, but they can be important in the context of a particular case. The intelligence agent was called into the case at bar not to ascertain the existence

of tax fraud but to substantiate the alleged fraud which the first agent had already ascertained. The petitioner contends that the Court should examine the totality of circumstances surrounding the case in order to determine whether or not the statute has been correctly utilized for its intended purpose and in accord with constitutional guarantees. It would be a trespass on the law to permit the government to maintain a civil disguise for its investigation when its agents have already determined that they are chiefly interested in criminal fraud in order for the government to utilize the readily available power of a mainly civil statute to ferret out evidence sought for a criminal prosecution.

In the case at bar, the intelligence agent stated that his main purpose in this investigation was to substantiate evidence of tax fraud which the initial investigation by another agent had ascertained. (R 23) The Court must look at this in light of first agent's admission that he had gone beyond the pont of mere suspicion to the point of confirmed suspicion. (R 19) The aim of the investigation was criminal, not civil. The statute was, therefore, misapplied according to the guideline formulated for its proper use as set forth in *Donaldson.*

The Court in *Donaldson* carefully distinguished the facts of that case and noted it was not a case in which the records in the hands of the party at whom the summons was directed belonged to the taxpayer or in which the taxpayer had a proprietary interest. The line of cases from which *Donaldson* evolves all share a common fact situation: the government is attempting to have records belonging to X brought forward which are in X's possession but which relate to X's dealings with

Z, the taxpayer.[1] In none of the cases did the Court find that the taxpayer had established any ownership rights in the records.[2] The summons as applied to those situations, whether civil or criminal, extracts information only from the records or mouth of another party. Neither the records nor the mouth are those of the taxpayer. An exception would be those cases in which the person who has possession of the documents is the majority shareholder of the corporation which owns them or an officer of the organization which owns them. When, however, the situation is reversed and the records in the hands of X belong to taxpayer then the interpretation of the code section must surely alter. The IRS is not simply asking another to tell what he knows about his business with taxpayer. The government is asking the taxpayer to disclose his own dealings. The situation whether wholly accusatory or only partially accusatory must necessarily allow the taxpayer to protect his rights. The Constitution does not drop its shield in front of the taxpayer only when he is faced with the actual indictment. It also protects him during the preparatory and investigatory stages.[3] The protections contemplated by the 4th and 5th amendments would be of little value otherwise. As the statute applies to the case at bar, then, it has been misused and is void. The government may not be permitted to use it against the taxpayer himself or his personal records.

The case at bar is analogous to *Deck* v. *U. S.* 339F2d-739. (1964). There the government directed a summons

[1] *Reisman* v. *Caplin* 375US440, 11LEd 2d 459 (1964) at 466
Wild v. *United States*, 362 F 2d 206 at 209 (1966)
Venn v. *United States* 400F 2d 207 at 210 (1969)
[2] *U. S.* v. *Roundtree* (CA5, 420 F2d 485 1969)
[3] *Miranda* v. *Arizona* 384 US 436 (1966)
Escobedo v. *State of Illinois* 378 US 478 (1964)

to Deck, attorney for taxpayer Kless who was under investigation, seeking to have produced certain work papers allegedly belonging to Phillips, an accountant who had prepared tax returns for taxpayer Kless. Kless intervened in the action and claimed the papers belonged to him; however, the court ruled that the work papers belonged to the accountant. The Court considered the ownership of the papers important to the outcome of the case and concluded that as ownership was in Phillips that Deck would be compellable to produce them in spite of taxpayer Kless' assertion of privilege. The inference here though is that if the papers had belonged to Kless, but in Deck's hands, they would not have been reachable via a summons. Ownership of work papers produced by an accountant was subsequently held to be determinative of whether or not the papers were reachable via an IRS summons, when in the hands of the client-taxpayer.[4]

IV

The difficulty and time required to prepare data for use in tax returns has compelled taxpayers to retain specialists for that specific purpose. The increased complexity of government should not be used as an excuse whereby individuals are compelled to forfeit basic rights.

A.

The difficulties of preparing an individual tax return have been well documented in the last few years. Indeed, the IRS has itself recognized the problem by making an inordinately large number of its agents available during the early months of 1972 to aid taxpayers in the preparation of their returns. The rapid proliferation

[4] *United States* v. *Levy* 270 F Supp 601 at 603 (1967)

of tax preparation firms is testimony to the complexities of the return and reporting procedure required by the government. The brute size and maze work of the Internal Revenue Code provides the last measure of testimony as to the rigors of the tax system.

Having established such a disjointed, complex mass, which has compelled many taxpayers to seek outside aid, the IRS now desires to benefit from the conditions it has created by arguing that taxpayers forfeit substantive constitutional rights when their private papers are delivered to their hired experts. Your petitioner contends that such a forfeiture of rights under the 4th and 5th Amendments would virtually drain the amendments of meaning in a society whose bureaucracy is ever expanding and continually demanding that individuals make various reports touching on all aspects of life. The expertise required to report to the IRS is obviously beyond the capability of many individuals and the Petitioner alleges that the 4th and 5th Amendments were enacted to protect the individual from the terrible burden of an accusatorial government. To fulfill the mandate of those amendments the testimony, whether or not written, of an individual must continue to be privileged regardless of governmental pressure to usurp it for its own ends.

B.

If the written testimony of a taxpayer is not protected the Petitioner alleges that the IRS will be generally hindered in administering the revenue laws. As is now frequently the case, taxpayers permit their records to be examined at the offices of their accountants or attorneys, however, if to permit those documents to be removed from their immediate, personal possession will

work a forfeiture of substantive rights, your Petitioner contends that the motive for cooperation will be sharply limited. The taxpayer will be well advised to take his private records into his personal possession in order to be sure his 5th Amendment rights will be applicable in the event the question of impropriety is raised. In such circumstances, the convenience and orderliness of the IRS in administering the revenue laws and conducting audits would be severely hampered to the detriment of the government by the difficulty the IRS will encounter in obtaining the necessary cooperation of the individual taxpayer so essential in what is basically a "self-reporting" system.

CONCLUSION

For the reasons set forth above, your Petitioner prays that the enforcement of the summons be denied.

Respectfully submitted,

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